STATE OF MICHIGAN

COURT OF APPEALS

DIANA M. CAMPBELL,

Plaintiff-Appellant,

v

N.A.Y., INC., d/b/a, HENNESSEY'S PUB,

Defendant-Appellee.

UNPUBLISHED
February 5, 2004

No. 240686
Oakland Circuit Court
LC No. 01-030950-NO

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting defendant summary disposition under MCR 2.116(C)(10). Plaintiff was injured after tripping over a stage while playing pool at Hennessey's Pub, defendant's bar and restaurant. The trial court agreed with defendant that the stage was an open and obvious danger that precluded any liability on defendant's part. We agree and affirm.

On March 15, 2000, plaintiff entered Hennessey's with three co-workers. This was apparently her third visit to Hennessey's, the first being in 1997 and the second in 1998. At some point, plaintiff and one of her co-workers decided to play a game of pool. The game was uneventful until plaintiff, while attempting to line up a shot near the end of the game, stepped back and fell over the stage. Plaintiff suffered a severe fracture of her right ankle that required surgery to repair.

Plaintiff argues that the trial court erred in concluding that the risk posed by the stage was open and obvious. We disagree. A trial court's decision whether to grant summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court reviews the record in the same manner as the trial court to determine whether the moving party was entitled to judgment as a matter of law. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 679; 662 NW2d 804 (2003).

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. A motion for summary disposition should be granted when, except in regard to the amount of damages, there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. In deciding a motion brought under this subsection, the trial court must consider affidavits, pleadings, depositions, admissions, and

> other evidence submitted by the parties, in a light most favorable to the nonmoving party. The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. . . . The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. [*Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 611-612; 658 NW2d 494 (2003) (Citations omitted).]

"In premises liability cases, the duty owed by the landowner is determined by the plaintiff's status at the time of the injury." *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). There is no dispute that plaintiff was a business invitee. See *Stitt v Holland Adundant Life Fellowship*, 462 Mich 591, 598-597; 614 NW2d 88 (2000). "It is well settled in Michigan that a premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury." *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992).

"[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id*. at 96. In determining whether a risk is open and obvious, a court must examine the "objective nature of the condition of the premises" and not the "subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp Inc*, 464 Mich 512, 524; 629 NW2d 384 (2001). However, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* at 517. Two examples of such special aspects include when the condition is effectively unavoidable, and when the condition presents a high risk of severe harm. *Id.* at 518.

Plaintiff argues she could not have seen the stage on a casual inspection of the premises. We disagree. The owner of Hennessey's at the time of plaintiff's accident indicated in his affidavit that the stage "rose approximately 12-14 inches off the floor," that there "were three lights on the ceiling above the stage illuminating the stage," and that there were "three tables with four chairs each on the stage in addition to two video poker machines on the stage." Taken together, this evidence supports the conclusion that both the stage and the risk its elevated height posed to people moving about Hennessey's was readily discoverable on casual inspection. See *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 476-477; 499 NW2d 379 (1993).

Plaintiff's argument to the contrary seems to center on the lighting conditions at Hennessey's. In her brief on appeal, plaintiff describes the lighting as being "dim" throughout the bar, and argues that the stage was hidden in shadows. However, according to her testimony at deposition, there was apparently enough light in the area for plaintiff to see at least one of the video games that was on the stage. There was also apparently enough light around the pool table for plaintiff to walk to it without incident before the game began, and to maneuver around it throughout the game until her accident. Similarly, there was apparently enough illumination throughout the entire facility for plaintiff to enter, find a table, and walk to and from the restroom.

As for the owner's assertion that the stage was lit by three hanging lights, plaintiff did not directly contradict this in her deposition. Rather, although initially testifying at deposition that she did not "believe there was any lighting" over the stage, when asked if lights *could* have been over the stage, plaintiff responded that she was "not sure." These equivocations do not establish a genuine issue regarding the lighting of the stage. *Kelly-Stehney, supra*.

There is also a lack of evidence that there was any "special aspect" of the risk posed that would make it unreasonably dangerous. First, there is no indication that the risk was "effectively unavoidable." *Lugo, supra* at 518. There is no evidence that a person had to come in direct contact with the stage while playing pool. Indeed, plaintiff apparently played for some time without incident, only coming into contact with the stage when she moved back and away from the pool table. Second, there is no indication that the risk posed by tripping over the stage presented "such a substantial risk of death or serve injury . . . that it would be unreasonably dangerous to maintain the condition." *Id.* See also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 621; 537 NW2d 185 (1995) (finding summary disposition to have been properly granted where "[t]he plaintiffs only assertion for finding that the step was dangerous was that she did not see it"). Accordingly, we find no error in the trial court's grant of summary disposition in favor of defendant.

We affirm.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ Richard A. Bandstra